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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

Donald Hugh Nichols

Defendant.

No. CR-18-01684-TUC-CKJ (BGM)

REPORT AND RECOMMENDATION

Currently pending before the Court is Defendant Donald Hugh Nichols's Motion to Dismiss Count 10 for Lack of Federal Jurisdiction (Doc. 70), Motion to Dismiss Count 10 – Void for Vagueness (Doc. 71), and Motion to Dismiss Count 10 of the Indictment for Failure to State and Offense (Doc. 72). The Government has filed its responses (Docs. 79, 80, 81) and Defendant replied (Docs. 86, 87, 89). Defendant Donald Hugh Nichol's is charged with seven (7) counts of wire fraud; one (1) count of theft of livestock; and one (1) count of retaliating against a witness, victim, or an informant. Superseding Indictment (Doc. 21).

Pursuant to LRCrim. 5.1, this matter came before Magistrate Judge Macdonald for oral argument and a report and recommendation. The Magistrate Judge recommends that the District Court, after its independent review, deny Defendant's motions.

I. FACTUAL BACKGROUND

Clay Matthew ("Buck") Parsons works at Marana Stockyards, his family's

1 business. Hr'g Tr. 2/7/2020 (Doc. 99) at 32:16–33:11. Mr. Parsons has been employed
2 by Marana Stockyards since 2013. *Id.* at 33:6–15. Marana Stockyards is a livestock
3 auction that markets cattle for sellers and is a location for buyers to purchase cattle. *Id.* at
4 33:25–34:3. The cattle sold at Marana Stockyards come from all over Arizona, as well as
5 neighboring states, and occasionally more distant states and Mexico. *Id.* at 34:4–9, 35:6–
6 8. Mr. Parsons's responsibilities at the stockyard include assisting in the management of
7 the day-to-day business; managing fellow employees; sorting, loading, and unloading
8 cattle; working with accounts receivable; and working with collecting money and
9 custodial accounts. *Id.* at 33:16–24, 41:22–24.

10 Mr. Parsons described the auction process and indicated that cattle typically arrive
11 at the auction house beginning a couple of days prior to the auction through to the day of
12 auction. Hr'g Tr. 2/7/2020 (Doc. 99) at 34:10–13. Auctions take place on Wednesday,
13 with cattle beginning to arrive as early as the weekend prior. *Id.* at 34:14–20, 41:25–
14 42:5. Mr. Parsons testified that generally the seller brings the cattle, or if it is a large
15 enough ranch or consigner, the cattle will be shipped to the stockyard. *Id.* at 34:21–35:1,
16 42:15–25. Mr. Parsons further testified that once the rancher arrives at the stockyard, the
17 cattle are unloaded, inspected, tagged, and paperwork is reviewed. *Id.* at 35:9–20, 43:17–
18 24. Marana Stockyards stores and cares for cattle until the Wednesday auction, but it
19 does not hold title at this time. *Id.* at 43:1–16. Mr. Parsons described the actual auction
20 as a live auction where cattle are brought in, weighed, and viewed by sellers and buyers
21 who are in the stands. Hr'g Tr. 2/7/2020 (Doc. 99) at 35:21–36:3, 59:2–17. Mr. Parsons
22 explained that in-person buyers live bid on the cattle, and the auction is also live-
23 streamed so that approved buyers can bid online from wherever they are and sellers can
24 watch, as well. *Id.* at 36:6–23, 59:2–60:5. Mr. Parsons also noted that potential buyers
25 can also bid via telephone. *Id.* at 36:24–37:1. Mr. Parsons indicated that a large majority
26 of Marana Stockyards' sales are to brokers buying cattle for people out of state. *Id.* at
27 53:1–14. Mr. Parsons observed that in terms of volume, non-broker purchasers represent
28 a minority of the overall total head of cattle sold. *Id.* at 53:15–54:1.

1 After a buyer has won the bid, that individual will go into the office, Marana
2 Stockyards will collect payment and exchange paperwork, and then the stockyard will
3 load the buyer's cattle. Hr'g Tr. 2/7/2020 (Doc. 99) at 37:2–16. For online buyers or
4 brokers who are not physically present, the cattle are moved to the individual's or entity's
5 name; the buyer/broker will inform Marana Stockyards when the cattle are leaving, who
6 is hauling them, how they are getting there, and how payment will be made; and Marana
7 Stockyards will send invoices and await payment. *Id.* The stockyard only takes cash or
8 checks for in-person payment, otherwise payment is received through wire transfer. *Id.* at
9 37:17–38:7. Once a buyer has paid for their cattle, it is loaded onto trucks or other
10 transport and sent to their destination. *Id.* at 38:8–14. Mr. Parsons further explained that
11 the seller is paid immediately irrespective of how long it takes the buyer to remit
12 payment. Hr'g Tr. 2/7/2020 (Doc. 99) at 40:19–41:8. Marana Stockyards has a custodial
13 account in which it deposits money from a credit line, and when an animal is sold, the
14 stockyard immediately writes a check to the seller and provides it to them in person, if
15 they are present, or via mail. *Id.* at 40:19–41:8, 54:19–55:2, 55:23–56:22, 57:20–58:7.
16 As a result, if a buyer fails to pay, Marana Stockyards retains ownership of the cattle. *Id.*
17 at 44:6–11, 57:20–59:1.

18 Mr. Parsons testified that the Wednesday prior to the hearing an auction was held
19 at Marana Stockyards. *Id.* at 38:15–16. Mr. Parsons further testified almost 1,100 head
20 of cattle were sold. *Id.* at 38:17–18. Mr. Parsons also testified that by the time of the
21 hearing, two (2) days later, that there were approximately 100 head of cattle remaining at
22 the stockyard. *Id.* at 38:19–22. Mr. Parsons indicated that the majority of the thousand
23 cattle that were transported were taken out of state to Texas, as well as California and
24 New Mexico. Hr'g Tr. 2/7/2020 (Doc. 99) at 38:23–39:2, 44:12–17. Mr. Parsons noted
25 that Arizona does not have many places to feed cattle, nor are there many
26 slaughterhouses. *Id.* at 62:3–63:3. Mr. Parsons explained that occasionally a purchaser
27 would buy more cattle than could be loaded on a single truck. *Id.* at 50:13–20. In such
28 cases, a buyer might have to arrange for multiple trucks or for smaller numbers of

1 overflow, buyers might arrange with Marana Stockyards to hold the extra head over. *Id.*
2 at 50:21–51:12. When cattle are held over, buyers are responsible to Marana Stockyards
3 for the cost of feed. *Id.* at 51:13–16. Mr. Parsons testified that it would be unusual for
4 buyers to put the cattle back up for sale. Hr'g Tr. 2/7/2020 (Doc. 99) at 51:19–52:6.

5 Mr. Parsons noted that on the Thursday or Friday following each sale, Marana
6 Stockyards prepared a market report. *Id.* at 39:3–5. Mr. Parsons described the market
7 report as a tool that provides an overview of the different classifications and weights of
8 cattle to provide an overview of what was brought that day. *Id.* at 39:6–10. Mr. Parsons
9 explained that sellers, buyers, other auction barns utilize Marana Stockyards' market
10 report. *Id.* at 39:11–23. Mr. Parsons further explained that sellers use the market report
11 to compare how their cattle sold compared to the market as a whole; buyers use it to see
12 if the cattle they purchased were within the range or if they want to buy from Marana;
13 and other auction barns compare their market to Marana Stockyards' market on that day.
14 *Id.* Additionally, the market report is one way that Marana Stockyards advertises to
15 buyers and sellers, it is mailed, both electronically and via post, as well as posted on the
16 company's website. Hr'g Tr. 2/7/2020 (Doc. 99) at 40:2–11. Mr. Parsons reported that
17 Marana Stockyards also advertises via Facebook, word of mouth, and telephone. *Id.*

18 Mr. Parsons testified that he knew Defendant Hugh Nichols and indicated that he
19 was a bonded buyer at the stockyard. *Id.* at 45:5–19, 49:17–23. Mr. Parsons described a
20 bonded buyer as someone who is hired to buy cattle and has a bond protecting them in
21 the event that the actual buyer does not pay. *Id.* at 60:22–61:7. Mr. Parsons further
22 testified that Mr. Nichols would frequently attend auctions and buy cattle for himself and
23 other people out of state. *Id.* at 45:10–25, 46:20–47:10. Mr. Parsons also testified that
24 although he did not know the exact proportion of cattle that Mr. Nichols purchased to go
25 out of state versus those that he purchased for in state, Mr. Parsons believed that the
26 majority went out of state because he would load them on trucks headed to out-of-state
27 destinations. Hr'g Tr. 2/7/2020 (Doc. 99) at 46:1–19. Mr. Parsons testified that he did
28 not know whether Mr. Nichols owned a ranch. *Id.* at 61:8–11. Mr. Parsons further

1 testified that at some point he investigated who owed money on the Marana Stockyards
 2 accounts receivable account and determined that ninety (90) percent of the money owed
 3 was owed by Defendant's businesses—Nichols Cattle Company and Nichols
 4 Management. *Id.* at 63:3–25.

5 Count 10 of the Superseding Indictment (Doc. 21) charges Defendant Nichols with
 6 theft of livestock in violation of Section 667, Title 18, United States Code, and states:

7 From on or about August 2013, and continuing through on or about August
 8 2017, in the District of Arizona and elsewhere, the defendant, DONALD
 9 HUGH NICHOLS, knowingly obtained and used the property of another, to
 10 wit: cattle valued at \$1,649,585, which has a value of \$10,000 or more in
 11 connection with the marketing of such livestock in interstate or foreign
 12 commerce with the intent to deprive the true owner of the right to the
 13 property, a benefit of the property, and to appropriate the property to the
 14 defendants' own use or the use of another,, all in violation of Title 18,
 U.S.C. § 667, Theft of Livestock.

15
 16 Superseding Indictment (Doc. 21) at ¶ 27.¹

17 II. ANALYSIS

18 A. *Count 10 — Failure to State an Offense*

19 Mr. Nichols asserts that Marana Stockyards “holds and/or administers the funds
 20 between buyer and seller using the trust account required under the [Packers and
 21 Stockyard Act (“PSA”), 7 U.S.C. § 196], [and] therefore, MSY does not acquire title to
 22 the livestock but only stands in the position of a fiduciary.” Def.’s Mot. to Dismiss
 23 Count 10 of the Indict. for Failure to State an Offense (Doc. 72) at 3. Because Mr.
 24 Nichols was both the buyer and the seller of his cattle, he asserts that he “never
 25 relinquished title to his cattle under theses circumstances and did not violate 18 U.S.C. §
 26 667.” Def.’s Mot. to Dismiss Count 10 of the Indict. for Failure to State an Offense
 27 (Doc. 72) at 3; *see also* Def.’s Reply re Failure to State an Offense (Doc. 86) at 2.

28 ¹ This recitation reflects the stipulated removal of Defendant’s wife from the Superseding
 Indictment which occurred during the hearing. *See Hr’g Tr. 2/20/2020 (Doc. 99) 7:1–9.*

1 Defendant Nichols further urges that “[t]he PSA has provisions for the recuperation of
 2 unpaid accounts for market agencies[,]” which would have been the appropriate recourse
 3 for Marana Stockyards “for any claims of unpaid trust accounts[.]” *Id.* at 4. The
 4 Government asserts that Marana Stockyards “uses a line of credit to immediately pay
 5 sellers on the same day as the sellers sell their cattle at the auction.” Govt.’s Response re
 6 Failure to State an Offense (Doc. 81) at 2. The Government explains that as such, “once
 7 MSY pays the seller, the cattle becomes the property of MSY until the buyer pays MSY.”
 8 *Id.*

9 Section 667, Title 18, United States Code provides:

10 Whoever obtains or uses the property of another which has a value of
 11 \$10,000 or more in connection with the marketing of livestock in interstate
 12 or foreign commerce with intent to deprive the other of a right to the
 13 property or a benefit of the property or to appropriate the property to his
 14 own use or the use of another shall be fined under this title or imprisoned
 not more than five years, or both. The term “livestock” has the meaning set
 forth in section 2311 of this title.

15 18 U.S.C. § 667. “‘Livestock’ means any domestic animals raised for home use,
 16 consumption, or profit, such as horses, pigs, llamas, goats, fowl, sheep, buffalo, and
 17 cattle, or the carcasses thereof[.]” 18 U.S.C. § 2311. Marana Stockyards is a “sale barn”
 18 regulated by the PSA. Govt.’s Response re Failure to State an Offense (Doc. 81) at 2;
 19 Def.’s Reply re Failure to State an Offense (Doc. 86) at 3.

20 Here, Mr. Parsons explained that the seller is paid immediately irrespective of how
 21 long it takes the buyer to remit payment. Hr’g Tr. 2/7/2020 at 40:19–41:8. Marana
 22 Stockyards has a custodial account in which it deposits money from a credit line, and
 23 when an animal is sold, the stockyard immediately writes a check to the seller and
 24 provides it to them in person, if they are present, or via mail. *Id.* at 40:19–41:8, 54:19–
 25 55:2, 55:23–56:22, 57:20–58:7. As a result, if a buyer fails to pay, Marana Stockyards
 26 retains ownership of the cattle. *Id.* at 44:6–11, 57:20–59:1. Mr. Parsons testified that the
 27 paperwork that accompanies a sale includes invoices and brand papers which contain the
 28 buyer’s name and information, as well as the animal’s information. *Id.* at 58:18–59:1.

1 Mr. Parsons further testified that this paperwork also states that Marana Stockyards
 2 retains ownership until the cow is paid for. *Id.* The Court finds Mr. Parson's testimony
 3 credible. As such, the Court further finds Defendant's assertion that "MSY had no
 4 ownership or title to the cattle, and therefore, clearly could not have been the victim
 5 under 18 U.S.C. § 667" is without merit. The Court recommends denial of Defendant's
 6 motion to dismiss for failure to state an offense.

7 ***B. Count 10 — Lack of Jurisdiction***

8 Mr. Nichols asserts that "assuming *arguendo* that the Court accepts that the term
 9 'marketing' encompasses the sale of livestock at a sale barn, and that the Marana
 10 Stockyard is the correctly defined victim, the offense conduct at issue is purely
 11 intrastate." Def.'s Mot. to Dismiss Count 10 for Lack of Fed. Juris. (Doc. 70) at 5. Mr.
 12 Nichols further asserts that "[i]f interstate transport of the cattle occurred, it necessarily
 13 must have occurred after the sale at auction of the cattle, necessarily after the act
 14 constituting the deprivation of property occurred." *Id.* Mr. Nichols also urges that the
 15 language of Section 667, Title 18, United States Code, is "more limited in scope,
 16 reflecting an intent by Congress not to extend its commerce power to reach fully
 17 intrastate conduct[,]" requiring dismissal of Count 10 for lack of federal jurisdiction.
 18 Def.'s Mot. to Dismiss Count 10 for Lack of Fed. Juris. (Doc. 70) at 3. The Government
 19 argues that the statute at issue is broader than the authority relied on by Defendant.
 20 Govt.'s Response re Lack of Fed. Juris. (Doc. 80) at 4. The Government further asserts
 21 that the allegation of activity by Defendant "in Arizona and elsewhere" is sufficient for
 22 jurisdictional purposes. *Id.* at 5.

23 As an initial matter, "[t]he district courts of the United States shall have original
 24 jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the
 25 United States." 18 U.S.C. § 3231. Furthermore, it is well established law that "[a]n
 26 indictment returned by a legally constituted and unbiased grand jury, like an information
 27 drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the
 28 merits." *Costello v. United States*, 350 U.S. 359, 363, 76 S. Ct. 406, 409, 100 L. Ed. 397

1 (1956). “[A] defendant may not properly challenge an indictment, sufficient on its face,
 2 on the ground that the allegations are not supported by adequate evidence.” *United States*
 3 *v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (quotations and citations omitted). The
 4 Supreme Court of the United States has said “that there are three categories of activity
 5 that Congress may regulate under its commerce power: (1) the use of the channels of
 6 interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things
 7 in interstate commerce, even though the threat may come only from intrastate activities;
 8 and (3) those activities having a substantial relation to interstate commerce, . . . i.e., those
 9 activities that substantially affect interstate commerce.” *Taylor v. United States*, — U.S.
 10 —, 136 S. Ct. 2074, 2079, 195 L. Ed. 2d 456 (2016) (quotations and citations omitted)
 11 (alterations in original). “[T]he starting point in every case involving construction of a
 12 statute is the language itself.” *Watt v. Alaska*, 451 U.S. 259, 265, 101 S. Ct. 1673, 1677,
 13 68 L. Ed. 2d 80 (1981) (citations omitted).

14 Here, the theft of livestock statute proscribes obtaining or using “the property of
 15 another which has a value of \$10,000 or more in connection with the marketing of
 16 livestock in interstate or foreign commerce with intent to deprive the other of a right to
 17 the property or a benefit of the property or to appropriate the property to his own use or
 18 the use of another[.]” 18 U.S.C. § 667. “Marketing” is defined as “the act or process of
 19 selling or purchasing in a market[.]” Merriam-Webster Dictionary,
 20 <https://www.merriam-webster.com/dictionary/> (last visited June 26, 2020). “In
 21 connection with” is an idiom meaning “in relation to” or “for reasons that relate to.” *Id.*
 22 Defendant likens the scope of the statute at issue to that of a pre-2007 child pornography
 23 statute which “punishe[d] any person who knowingly mail[ed], or transport[ed] or
 24 ship[ped] in interstate or foreign commerce by any means, including by computer, any
 25 child pornography.” *United States v. Wright*, 625 F.3d 583, 591 (9th Cir. 2010).
 26 Defendant urges that the theft of livestock statute represents a narrow exercise of
 27 Congress’s commerce power. Def.’s Mot. to Dismiss re Lack of Jurisdiction (Doc. 70) at
 28 3. Defendant further argues that the Government’s failure “to distinguish which

1 transactions properly arose out of interstate transactions and which were solely intrastate”
 2 divests this Court of jurisdiction over Count 10. Def.’s Reply re Lack of Jurisdiction
 3 (Doc. 89) at 2–3. Defendant asserts that the Theft of Livestock statutes falls within the
 4 second category of commerce regulation “involving persons or things in interstate
 5 commerce.” *Id.* at 3.

6 The text of the theft of livestock statute does not support the narrow construction
 7 put forth by Defendant. The statute in *Wright* proscribed the specific and identifiable acts
 8 of mailing, transporting, or shipping in interstate commerce. *Wright*, 625 F.3d at 591.
 9 The theft of livestock statute punishes obtaining or using the property of another “in
 10 connection with the marketing of livestock in interstate or foreign commerce[,]” which
 11 means in relation to the act or process of selling or purchasing in a market. The
 12 allegation of Count 10 refers to Defendant’s conduct that occurred “in the District of
 13 Arizona and elsewhere.” Moreover, Defendant’s argument places the statute within the
 14 second category of commerce clause regulation, “the instrumentalities of interstate
 15 commerce, or persons or things in interstate commerce,” but ignores that the Supreme
 16 Court has contemplated that “the threat may come only from intrastate activities[.]”
 17 *Taylor*, — U.S. —, 136 S. Ct. at 2079. The Court finds that the plain language of Section
 18 667, Title 18, United States Code, supports federal jurisdiction of the charge alleged in
 19 Count 10 of the Superseding Indictment and recommends Defendant’s motion to dismiss
 20 be denied.

21 C. Count 10 — Void for Vagueness

22 Mr. Nichols asserts that “the language [of the Theft of Livestock statute] is too
 23 vague as to properly define a crime.” Def.’s Mot. to Dismiss Count 10 — Void for
 24 Vagueness (Doc. 71) at 2. Mr. Nichols argues that the statute violates Due Process
 25 because “it fails to give reasonable warning as to what conduct is proscribed and what
 26 conduct is not.” *Id.* at 4.

27 “To satisfy due process, a penal statute [must] define the criminal offense [1] with
 28 sufficient definiteness that ordinary people can understand what conduct is prohibited and

[2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Skilling v. United States*, 561 U.S. 358, 403, 130 S. Ct. 2896, 2928, 177 L. Ed. 2d 619 (2010) (quotations and citations omitted) (alterations in original). “In interpreting a statute, [a court] must examine its language[;] [i]f the statute is clear and unambiguous, that is the end of the matter.” *United States v. Chhun*, 744 F.3d 1110, 1116 (9th Cir. 2015).

Here, Defendant argues that the term “marketing” is unclear. Def.’s Mot. to Dismiss Count 10 — Void for Vagueness (Doc. 71) at 3–5. As discussed in Section II.B., *supra*, “marketing” is defined as “the act or process of selling or purchasing in a market[.]” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/> (last visited June 26, 2020). The theft of livestock statute proscribes obtaining or using “the property of another which has a value of \$10,000 or more in connection with the marketing of livestock in interstate or foreign commerce with intent to deprive the other of a right to the property or a benefit of the property or to appropriate the property to his own use or the use of another[.]” 18 U.S.C. § 667. As such, an individual is prohibited from 1) obtaining or using; 2) the property of another which has a value of \$10,000 or more; 3) in connection with the marketing (the act or process of selling or purchasing in a market) of livestock in interstate or foreign commerce; 4) with intent to deprive the other of a right to the property or a benefit of the property or to appropriate the property to his own use or the use of another. The Court finds the statute’s language is clear and unambiguous and recommends that Defendant’s motion be denied.

III. CONCLUSION

The Court finds that dismissal of Count 10 of the indictment is unwarranted.

IV. RECOMMENDATION

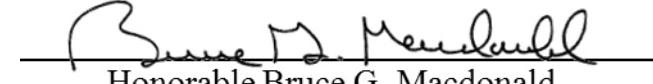
For the foregoing reasons, the Magistrate Judge recommends that the District Court DENY Defendant Donald Hugh Nichols’s Motion to Dismiss Count 10 for Lack of

1 Federal Jurisdiction (Doc. 70), Motion to Dismiss Count 10 – Void for Vagueness (Doc.
2 71), and Motion to Dismiss Count 10 of the Indictment for Failure to State and Offense
3 (Doc. 72).

4 Pursuant to 28 U.S.C. §636(b) and Rule 59(b)(2) of the Federal Rules of Criminal
5 Procedure, any party may serve and file written objections within fourteen (14) days after
6 being served with a copy of this Report and Recommendation. No reply shall be filed
7 unless leave is granted from the District Court. If objections are filed, the parties should
8 use the following case number: **CR-18-01684-TUC-CKJ**.

9 Failure to file timely objections to any factual or legal determination of the
10 Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right
11 of review.

12 Dated this 2nd day of July, 2020.

13 
14 Honorable Bruce G. Macdonald
15 United States Magistrate Judge